No. 238

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

ESTATE OF PAUL LOUGHRIDGE, DECEASED,
MARJORIE MEAD LOUGHRIDGE, EXECUTRIX,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

REPLY BRIEF OF PETITIONER

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Argument in Reply.

The respondent asserts that the lower Court's decision involves no conflict with the decision in *Hays Estate* v. *Commissioner,* 181 F. (2d) 169 (Respondent's Br. pp. 8, 11) and that the holding below is in complete accord with this Court's decision in *Commissioner* v. *Estate of Holmes,* 326 U. S. 480 (Respondent's Br. p. 8).

The respondent was equally positive in its argument before the Fifth Circuit that the *Holmes* case, *supra,* disposed of all issues in the *Hays* case *supra,* saying at p. 8 of its brief in the latter case:

> "We regard the decision of the Supreme Court in the case of *Commissioner* v. *Estate of Holmes,* 326 U. S. 480, as determinative of the issue here. There, as here, the decedent's children were named as the income beneficiaries and were to receive equal shares of the corpus of the trust upon its termina-

> tion, if alive; otherwise other persons specified in the trust were to receive it. Thus, in the *Holmes* case, as here, until the decedent's death, or an earlier termination of the trust by the decedent pursuant to the reserved power, it could not be known who would receive the corpus of the trust or the accumulated income. On the other hand, by terminating the trust, the decedent here, as in the *Holmes* case, could have caused all rights to both the corpus and the accumulated income to fall in immediately; and, by the same token, she could have cut off all other beneficiaries who might otherwise have taken both the corpus and the accumulated income upon a later termination of the trust, whether pursuant to the reserved power, or at and as a result of her death".

Faced with the fact that the Tenth and Fifth Circuits reached contrary conclusions on two cases which the respondent argues were governed by the *Holmes* case, *supra,* the respondent attempts to bridge the diversity by saying that the Fifth Circuit recognized the correct principles but that its decision was contrary to the decision of this Court in the *Holmes* case, *supra.* The respondent now says:

> "In the *Hays* case, the Court of Appeals recognized the correctness of the principle followed by the Court of Appeals here, namely, that the retention by the donor of the power to terminate a trust and thus to insure the present enjoyment by the named beneficiaries of shares of the trust corpus which otherwise they might never obtain, requires the inclusion of the corpus in the estate of the donor. * * * Moreover, the *Hays* decision is contrary to this Court's decision in *Commissioner* v. *Estate of Holmes* 326 U. S. 480, rehearing denied, 327 U. S. 813, where it was pointed out (p. 486) that the term 'enjoyment' in Section 811(d) connotes a present economic benefit rather than a technical vesting of a fee simple equitable interest." (Respondent's Brief, pages 11, 12).

More simply stated, the respondent's argument is that the power to terminate and insure present enjoyment by the named beneficiaries should be the sole governing principle in each case, but that the decision of the Fifth Circuit was contrary to this Court's decision in the *Holmes* case because "enjoyment" connotes a present economic benefit rather than mere vesting of an estate.

Surely, a conflict between the circuits is real and substantial when the respondent admits and emphasizes that the same principle of law is at issue in each of two cases and one of the courts has properly applied the principle and the other has not.

Despite this demonstration of conflict, and despite the respondent's express admission that "the *Hays* decision is contrary to this Court's decision in *Commissioner* v. *Estate of Holmes,* 326 U. S. 480" (Respondent's Brief, pages 11, 12), and although other cases are pending before the courts, the repondent has failed to petition this Court, in the *Hays* case, *supra,* so that the taxpayers and the administrative officers of the Treasury Department may have a clear cut statement of principle to guide them.

If we accept "present economic benefit rather than a technical vesting of a fee simple equitable interest", as the test, how does that resolve the respondent's dilemma in the denial of a conflict between the circuits?

In the *Holmes* case, *supra,* the named beneficiaries (the grantor's sons) had no absolute present economic benefit whatsoever. The trust could have been extended for twenty-one years after the death of the last surviving son. In the meantime, accumulation of the income was in the absolute discretion of the settlor. The trust, moreover, provided a stringent spendthrift clause. On the test suggested by the respondent the named beneficiaries had neither present economic interest nor a vested estate.

In the *Hays* case, *supra,* there was a spendthrift clause,

the settlor had discretion with respect to accumulation of income (as well as the right to apply income and principal to satisfaction of her original debt). The Fifth Circuit held, however, under the Mississippi law, that the named beneficiaries had an equitable estate of inheritance. But, in view of the spendthrift clause and the power of accumulation did the settlor convey any absolute present economic benefit so as to detract from her power of testamentary disposition?

In the instant case, the beneficiaries were not subject to a spendthrift clause, they had therefore, a present estate of definite economic value. There was no discretion with respect to distribution of income; after the majority of the beneficiaries it had to be distributed currently. Moreover, the beneficiaries had a general power of appointment by will under which the beneficiary could have appointed to his estate, to his creditors, to named beneficiaries, or to a class or to his heirs. Do not these instances of present economic benefit and attributes of ownership dwarf into insignificance any alleged power to change enjoyment which the respondent ferrets out in a normal trust such as this?

Moreover, the power to terminate the trust was not reserved to the settlor, but to the trustee, and the decedent was not the trustee at the time of his death. Under the New York law there is substantial doubt as to whether he could ever have appointed himself trustee because he had not reserved that power (dissenting opinion, R. p. 371). Moreover, the decedent at the date of his death had not given the trustee notice to resign; therefore, he had no power to appoint a successor trustee, and did not therefore, at the date of his death, have any power whatsoever to change the enjoyment of the trust.

The *Holmes* case was in itself an extension of the application of Section 811(d)(2) (See discussion of preced-

ents by Mr. Justice RUTLEDGE at 326 U. S. 480, 482). Here, the Government attempts to further stretch the statute, to build an extension upon an extension, to go at least one step further than any case has gone. Yet, it is a well-known rule that tax statutes should be strictly construed and that any doubt should be resolved in favor of the taxpayer. (*Crooks* v. *Harrelson*, 282 U. S. 55, 61; *Gould* v. *Gould*, 245 U. S. 151). It is respectfully submitted that, it is a matter of great public importance in the administration of estates that the conflict between the interpretation of the *Holmes* case existing between the Fifth Circuit Court of Appeals and the Tenth Circuit Court of Appeals be authoritatively resolved and determined by this Court.

II.

The Respondent at page 14 of its brief states that the decision of the Court of Appeals for the Eighth Circuit in *Maryland Casualty Co.* v. *U. S.* 169 F. (2d) 102, is not in conflict with the present case with reference to the admission of parol evidence for the purpose of avoiding the consequences of a written agreement. In that case, the Circuit Court of Appeals held that where a contract, complete in itself, fails to incorporate a previous oral agreement, it must be presumed that the parties purposely rejected the earlier oral agreement and silence on a point which might have been embodied in the contract does not open the door to parol evidence in that regard. The Court therein further stated that testimony of a party to a written contract that he intended to express a meaning contrary to that which the law imposes upon the language of the contract is not admissible.

The stipulation entered into in the prior tax proceeding pertinent to the instant case, formalized into a consent judgment was complete and unambiguous. The notice of deficiency (Exhibit I to the Petition in the Harmon case,

R. 244-252) fixed the value of the Harmon Trust (R. 244), identified the property in the transfer (R. 245-251) and identified the transfer as being the Harmon Trust, established May 28, 1929. The notice of deficiency in the prior estate was an integral part of the pleading (Rules of Practice before the Tax Court of the United States, Rule 7, (1)). The facts stated in the notice of deficiency were presumptively correct, *and these facts were not changed by stipulation or the introduction of evidence in that proceeding.* The stipulation and the decision (R. 256-257) show the amount of tax fixed with reference to the entire estate including the Harmon Trust, the amount of tax paid, and the amount thereof determined to be overpayment.

What the Respondent sought to do by the introduction of parol evidence was to collaterally attack that consent judgment. The cases cited by the Respondent at page 14 of its brief supporting the admission of parol evidence are entirely distinguishable and pertain to written contracts which were ambiguous and incomplete, and none of them involve a consent judgment. The Respondent attempts to argue that only the parties to the prior tax proceeding would be bound by the stipulation and consent decree entered into therein. It is respectfully submitted that any such claim is violative of the intendment of Section 812(c) of the Internal Revenue Code. The statute fixes the credit in a subsequent proceeding "only in the amount *finally determined* as the value of such property in determining the value of * * * the gross estate of such prior decedent * * *". (26 U. S. C. A. Section 812(c)). (Italics ours.)

If the Respondent's position were correct, there would be no finality to any prior tax decree. It is respectfully submitted, as noted in our main brief, that the applicability of the parol evidence rule in a proceeding under Section 812(c) of the Internal Revenue Code presents a substantial and important question of public policy pertaining to the

collection of revenue, and it is respectfully submitted that the Supreme Court should render an authoritative decision clarifying the law and determining the finality of tax decrees in a previous proceeding within the meaning of Section 812(c) of the Internal Revenue Code.

It is therefore again respectfully submitted that these cases call for the exercise by this Court of its supervisory power by granting a writ of certiorari and thereafter reviewing and reversing said decisions.

Dated, New York, N. Y., September 18, 1950.

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